

CHILD OFFENDER: POLICIES AND THE EMERGENCY RULE

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Introduction

In 1977, a 14 year old child¹ was sentenced by the High Court to death. Lim Hang Seoh was charged and convicted for the offence of possession of a pistol and ammunition, an offence punishable under section 57 of the Internal Security Act 1960 (Act 82) (ISA) and was tried under the Essential (Security Cases) Regulations, 1975 (ESCAR). In his appeal to the Federal Court, the Court upheld the High Court decision.² In its' decision, the Federal Court agreed with the High Court that the accused, Lim Hang Seoh was aware of the contents of the bag he was carrying. *There was no evidence to show otherwise and that he was seen carrying the bag on four separate occasions.*³ The Federal Court further held that in view of the words '*the Juvenile Courts Act 1947, shall not apply to such person*' in regulation 3(3) ESCAR, there was only one sentence authorized by law for the offence, and that is the death sentence, despite the fact that the accused was only 14 years old.

The death penalty imposed on Lim Hang Seoh sparked concern and anger amongst people in and outside Malaysia. The Bar Council sent a telex to the Prime Minister in protest of the death sentence on the child. In its' telex, the Bar Council protested '*on the oppressiveness of ISA and ESCAR*'.⁴ ESCAR trials according to the Bar Council have virtually changed the form of criminal justice in Malaysia. ESCAR provide for some exceptions to the rule of evidence. It provides for exceptions to the rule against hearsay and the rule on corroboration amongst others.⁵ They said that the decision of the High Court '*sentencing a 14 year old boy to death for possession of firearms demonstrated the oppressive effect of these law.*'⁶ Public reaction on the death sentence remained unabated until on 14 October 1977, the Pardons Board in Kuala Lumpur announced that the death sentence on Lim Hang Seoh would be commuted at the pleasure of the Yang di Pertuan Agong (the King) to be detained in the Henry Gurney School⁷ in Malacca, until the age of 21 years. The following day, the government announced that the provision of the ESCAR will not be revoked.⁸

¹ S. 2 Child Act 2001 (Act 611) - (a) Means a person under the age of eighteen years; and (b) in relation to criminal proceedings, means persons who has attained the age of criminal responsibility as prescribed in section 82 of the Penal Code.

S 82 Penal Code (Act 574), the age of criminal responsibility is 10 years old.

² *Lim Hang Seoh v PP* [1978] 1 MLJ 68.

³ *Ibid* p 69.

⁴ Consent to Prosecute under ISA, INSAF, The Journal of the Bar Council, vol IX no. 1, April 1977, p 2.

⁵ See regulation 21 ESCAR

⁶ *Ibid* p 2.

⁷ The Henry Gurney School is a young offenders institution under the authority of Prison Department, s.73 Child Act 2001 (Act 611)

⁸ Lee Min Choon, Essential (Security Cases) Regulation 1975, A Review, A project paper submitted in partial fulfillment for the degree of Bachelor of Law (Hons), 1978/79. pp 272-273.

Law and Procedure

ESCAR was passed in December 1975. The Regulation was passed by the executive without having to go through the normal law making process, Parliament. This is possible as the country was still in the state of emergency,⁹ and the Yang di Pertuan Agong have power conferred to him by section 2 of the Emergency (Essential Powers) Ordinance No. 1, 1969, to make the Regulation. ESCAR trials as it is known are conducted for cases which fall within the definition of 'security offence' provided by regulation 2 (1) ESCAR.

Regulation 2 (1) reads,

'security offence' means an offence (whether committed before commencement of the Regulation) against sections 57, 58, 59, 60, 61, and 62 of the Internal Security Act 1960, or any offence against any written law the commission of which is certified by the Attorney General under paragraph (2) to affect the security of the Federation.

Apart from regulation 2, the provision which greatly affect children is provided by regulation 3(3) which clearly provide,

*Where a person is accused of or charged with a security offence, he shall **regardless of his age**, be dealt with in accordance with the provision of these Regulations and the Juvenile Courts Act 1947, shall not apply to such person.*

Section 16 of the Juvenile Courts Act 1947(Act 90)¹⁰ prohibits the sentence of death against a person convicted of an offence if it appears that at the time when the offence was committed the person was a juvenile.¹¹ Instead, the juvenile will be detained in the pleasure of the Yang di Pertuan Agong/Ruler. But regulation 3(3) bars the application of the Juvenile Courts Act 1947, which effect is clearly illustrated by the case of *Lim Hang Seoh*. Lim Hang Seoh was charged for an offence under section 57 ISA.

Section 57 (1) reads;

Any person who without lawful excuse, the onus of proving which shall be on that person, in any security area carries or has in his possession or under his control,

(a) any fire-arm without lawful authority thereof,

(b) any ammunition or explosive without lawful authority thereof,

shall be guilty of an offence and shall, on conviction be punished with death.

A security area based on section 2 and section 47 ISA is an area, proclaimed by the Yang di Pertuan Agong if, in his opinion, public security is seriously disturbed or threatened by reason of action being taken or threatened by any substantial body of person, whether inside or outside Malaysia, to cause a substantial number of citizen to fear organized violence. The proclamation is in operation until annulled by resolution passed by both Houses of Parliament. It should be noted that the whole of Malaysia is a security area as the earlier emergency has not been annulled by both Houses of Parliament.

⁹ The 1969 emergency has not been lifted.

¹⁰ The Juvenile Courts Act 1947 has been repealed by the Child Act 2001 (Act 611). Section 97 of Act 611 has retained the provision for detention in the pleasure the King/ Ruler in lieu of sentence of death.

¹¹ The word juvenile has the same meaning as child in a criminal proceeding. Between 10 years and under the age of 18.

The ISA was passed when the 1948 state of emergency was lifted in 1960.¹² Its purpose was mainly to secure the security of the country against subversion and to counter terrorism. The preamble of the ISA reads,

An Act to provide for the internal security of Malaysia, preventive detention, the prevention of subversion, the suppression of organized violence against persons and property in specified areas of Malaysia and for matters incidental thereto.

Tun Abdul Razak, the then Deputy Prime Minister who read the Bill at the House of Representative stated that

*...the Bill was introduced mainly because the emergency was to be lifted. But the government does not intend to relax its vigilance against the enemy who remained a threat and who are now attempting by subversion to succeed by force of arms The ISA has two main aims. ... First, to counter subversion throughout the country, and second, to enable the necessary measure to be taken on the border area to counter terrorism. The armed terrorist still exist at the Malaysian border waiting or remaining in existence waiting for an opportunity to revive their "arm struggle" against the people of Malaysia. They remain as a potential threat to the security of the country, which cannot be disregarded.*¹³

The opposition party criticized the government on the passing of ISA and accused them of trying to make the Act permanent compared to all other earlier laws. This is because all other emergency laws cease to be in operation at the end of one year unless it is renewed year after year by the Legislative Council and Parliament. The ISA on the other hand can only be revoked by resolution by both Houses of Parliament. Section 57 was also criticized for its new principle on laying the burden on the accused to disprove the charge.¹⁴ Section 57 expressly provide, *the onus of proving which shall be on the person....* Although Tun Abdul Razak in his speech also said that Part II (now Part III) which contains section 57, only apply to a 'security area' that is, *an area where we are fighting the terrorist and it will not be applicable to others*'. The reality of the whole matter is that until now, the whole country is a 'security area'.

15 years after the passing of ISA, in 1975, ESCAR was introduced as another security measure for the whole nation. The regulation applies to all persons. Even children were not spared by the operation of ESCAR. The reason behind the passing of ESCAR was that the whole nation was threatened by communist who was operating in the jungles of Malaysia. With the arm struggle and their ideology spreading fast, the government will have to act fast. Tan Sri Abdul Kadir the then Law Minister in his address to Parliament said,¹⁵

*...many security forces were killed. The communist agents as well as the communist themselves have come into town areas and started killing people. The communist tries to disrupt the country's development by instilling fear into the people, by killing people at random. Their ideology was spreading fast.*¹⁶

¹² In 1948, the country was threatened by the movement of the Communist Party of Malaya. The party was banned by the then government in 1948 after it launched an arm struggle against the government. Due to the threat, a wide state of emergency was declared for the whole country in 1948.

¹³ Hansard Malaysia, House of Representatives, Part 1 vol II 1960, p68.

¹⁴ Ibid p 1127.

¹⁵ Ibid p 9775. ESCAR was brought to Parliament mainly to allow the opposition to voice their concern and opposition on the Regulation.

¹⁶ Hansard Malaysia, Parliamentary Debate, House of Representative, 1st Parliament 4th session. 19 Dec 1975, p 9840.

The opposition opposed ESCAR due to its harshness, and in this context, regulation 3(3) which expressly include children in its operation. Their opposition was voiced by Tan Sri Tan Chee Khoo who opined that ESCAR has disregarded the vulnerability and mentality of children. He questioned the government of its purpose in using ESCAR against children. According to him,

*...children are and will be used as a tool rather than committing these offences at their own free will. Why are the government seeking war against children?*¹⁷

In his reply Tan Sri Abdul Kadir guaranteed that ESCAR was temporary just to meet the present circumstances. He said,

*...if there is more peace and if there is less attack in the urban area, ESCAR will be repealed. The regulation is a temporary measure and it will not be forever and will not be used for the future.*¹⁸

Not long after ESCAR was passed, the inevitable took place. Lim Hang Seah was convicted through ESCAR, he was sentenced to death. Although the death sentence was commuted at the pleasure of the Yang di Pertuan Agong to be detained at the Henry Gurney School until the age of 21 years, regulation 3(3) ESCAR remains in operation.

Child Law

Whilst the government was more concern with the security of the country at this stage of time, it must be noted that in April the same year, the issue of delinquency of children was debated in Parliament. The issue was discussed at the tabling of the amendment to the Juvenile Courts Act 1947(Act 90). Issues such as vulnerability of children, their immaturity, and causes of delinquency were discussed with members demanding better treatment for delinquents. Mr Edmand Langgu, a member of the opposition opined that the government plays a big role in the treatment of delinquents and should also share the blame of the rise of delinquency in this country. This is because, according to him, delinquency lies mainly on poverty.¹⁹ In response, the then Minister for Social Welfare, Puan Aishan Ghani said that in dealing with children, the government is taking steps to improve treatment such as in this case introducing better provision for probation and raising the age of criminal responsibility from 8 years to 10years old.²⁰ The Minister concluded that in making any decisions on children, the welfare of the child takes precedent over anything else.²¹

The country went on a nation wide 'child saving' mission after the Second World War which saw a rapid growth in economy which also saw growing social problems amongst children in the aftermath of war and the Japanese occupation. In 1946, an advisory council was formed to look into the problem of delinquency amongst children. The advisory council was given the task to look into '*the treatment of juvenile delinquency and the steps necessary in the interest of juvenile welfare in the Malayan Union.*'²² The advisory council reported its findings in June 1947²³, which

¹⁷ Ibid p 9800.

¹⁸ Ibid p 9840.

¹⁹ Hansard Malaysia, Parliamentary Debate, House of Representative, 4th Parliament, 1st session, 2 April 1975, p 3850.

²⁰ Ibid p 3836.

²¹ Ibid p 3855.

²² Proceeding of the Advisory Council Malayan Union 1946, B172. Report was tabled in June 1947.(Proceeding No 22 of 1947)

recommendation was essentially based on prevention and salvaging children from taking the life of crime. The recommendation was accepted and formed the Juvenile Courts Ordinance 1947. The Ordinance was revised in 1972 and published as the Juvenile Courts Act 1947(Act 90)²⁴. Act 90 was embodied on the philosophy that children which broke the law were not totally responsible for their criminal conduct and therefore should be shielded from punishment normally reserved for adults.²⁵ The preamble of Act 90 reads,

*An Act to provide **care** and **protection** of children and young persons and the establishment of Juvenile Court.*

Act 90 created the Juvenile Court²⁶, which plays a significant role as a symbol and the focus of child justice in the country. The creation of the court allows a child who commits an offence to be treated by the state not as a criminal but as a child in need of care and protection.²⁷ Act 90 provided sentencing powers and abolished death sentence on children. Special orders such as probation, approved schools and the Henry Gurney schools were provided for.²⁸ Although Act 90 is clear in its child saving mission, there was tension between the importance of safeguarding children and protecting the public within the government. This is most significant when in 1975 children were not excluded from the operation of ESCAR. The tension will continue for as long as ESCAR remains in operation.

In 1995, the government ratified the United Nation's Convention on the Rights of the Child (CRC) and in line with the ratification, a committee was appointed to review social laws that are relevant to children.²⁹ They are the Juvenile Courts Act 1947 (Act 90), Women and Girls Protection Act 1973 (Act 106), and, Child Protection Act 1991 (Act 468). In consequence of the review, in 2001, the Child Act 2001(Act 611) was passed and at the same time repealed the three Acts above. Act 611 encompasses these three Acts. The main objective of Act 611 was to unify laws relating to child-care, protection and rehabilitation as well as to provide remedial measures available to all courts with jurisdiction to all children.³⁰

Act 611 adopts a child-centred approach, with its principle aim being stated clearly in the preamble;

*An Act to consolidate and amend the laws relating to the care, protection and **rehabilitation** of children and to provide for matters incidental thereto.*

The preamble above aims to protect children from being tagged with a social stigma, and at the same time acknowledges the fact that a child delinquent is in a class of his own and requires special consideration and treatment. The aim is emphasized with the need for consideration of a probation report by the court before deciding how to deal with a child delinquent³¹, and also the separate treatment of a child from the adult.³²

²³ Malayan Union Proceedings No 22 of 1947.

²⁴ Repealed by Child Act 2001 (Act 611).

²⁵ See section 3, the establishment of Juvenile Court, s.12, powers of Juvenile Court on proof of offence.

²⁶ Section 3 Juvenile Courts Act 1947 (Act90).

²⁷ See preamble of Juvenile Courts Act 1947(Act 90).

²⁸ Section 12 Juvenile Courts Act 1947 (Act 90).

²⁹ Social Action Plan (PINTAS) set up in 1996.

³⁰ S. 83 trial at the High Court for criminal matters to conform with Child Act 2001 (Act 611).

³¹ Section 90(12), section 83(4) Child Act 2001(Act 611).

³² Section 91 and section 93 Child Act 2001(Act 611).

The preamble is clear it its mission to rehabilitate offenders through dispositions provided in section 91. Act 611 also made a few legislative changes in processing child offenders that is a movement towards balancing the court's traditional rehabilitative orientation with concerns for public welfare, and sanctions for serious crimes. Act 611 made specific provision for the interpretation of grave crimes,³³ which

Includes;

- (a) *the offences of murder, culpable homicide not amounting to murder or attempted murder;*
- (b) *all offences under the Firearms (Increased Penalties) Act 1971;*
- (c) *all offences under the Internal Security Act 1960 punishable with imprisonment for life or with death;*
- (d) *all offences under the Dangerous Drugs Act 1952 punishable with imprisonment for more than five years or with death; and*
- (e) *all offences under kidnapping Act 1961.*

In cases which fall within the interpretation of grave crimes, a child will not be entitled to bail or a probation order.³⁴ A child is also not entitled to a probation order if he has committed offences of voluntarily causing grievous hurt, rape, incest or outraging modesty, or any offences under sections 377B, 377C, 377D, or 377E of Penal Code, the offence categorized as unnatural offences.

Act 611 also took into consideration the gravity of the offence of murder. Before Act 611 came into operation, section 16 of Act 90 permits a child found guilty of the offence of murder to be detained during the pleasure of the Yang di-Pertuan Agong ,
... in such place and under such condition as the Yang di-Pertuan Agong or the state authority may direct, and whilst so detained shall be deemed to be in legal custody.

This means that a child found guilty of the offence can either be detained either at an approved school,³⁵ Henry Gurney School, or the prison or which ever institution which is appropriate to cater for his needs. Section 97 of Act 611 has taken away the discretion, and in its place, 97(2) provide,

.....in lieu of a sentence of death, the court shall order the person convicted to be detained in a prison during the pleasure of the Yang di-Pertuan Agong.

No discretion is given on this matter and the child shall be detained in prison. In 2002, in the case of *KWK (A Child) v PP*³⁶, a 13 year old child who was found guilty of murder was ordered to be detained in prison. The court was of the view that section 97 did not give discretion for him to be detained elsewhere.

The change in the provisions of the law above is the consequence of concern by the government which was engendered by the increase of incidents of offences committed generally by children. This resulted in the government taking steps to stem and reduce the increase of offending by children.³⁷ It answers the question as to why the above provisions were introduced and changed. As mentioned above, in the drafting of Act 611 concerns over public welfare and sanction for grave offences were taken into

³³ Section 2 Child Act 2001(Act 611).

³⁴ Section 84(3), section 98(1) Child Act 2001(Act 611).

³⁵ Section 65 Child Act 2001 (Act 611), under the authority of the Social Welfare Services.

³⁶ [2003] 4 CLJ 51.

³⁷ Abd, Hadi Zakaria, *The Child Act 2001, Some Significant Features*, in *Siri Undang-Undang Mimi Kamariah, Akta Kanak-Kanak 2001*, Siti Zaharah Jamaluddin, Norcaya Talib, Jal Zabdi Yusoff (ed). Penerbit UM 2002, p139.

consideration. With such background, it is no surprise that provision 3(3) ESCAR is retained. Section 133 Act 611 reads,

All rules, regulation, orders notices, forms, discretion and authorization letters made, or given under the repealed Act shall, in so far as they are consistent with the Act, continue in force until revoked or repealed by this Act.

Policy and Conclusion

The responsibility of instituting criminal proceeding against a person lies on the Attorney General. This is provided for in Article 145(3) of the Federal Constitution, which reads,

The Attorney General shall have power, exercisable at his discretion, to institute, conduct, or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court martial.

This means that the Attorney General, who is also the Public Prosecutor³⁸ not only has power to institute, conduct or discontinue proceedings, he also has discretion to decide on the kind of charge to be instituted against a person and this discretion lies solely on him.

In the case where a person is suspected to be in unlawful possession of firearms, the person may be charged under the Arms Act 1960(Act 21), for which the penalty is 7 years imprisonment, or under the Firearms (Increased Penalties) Act 1971(Act 37), for which the maximum penalty is 14 years imprisonment, or the ISA for which trial will be conducted under ESCAR, and the penalty is death. In such a case, the Attorney General has discretion to charge a person under any of the three statutes above. He can if he thinks fit charge a person on a lesser charge.³⁹ Sufian LP in his decision in the case of *Johnson Tan Han Seng v PP*⁴⁰ was of the view that in instituting a charge against a person, the Attorney General is permitted to take into account the public interest in deciding what charge or charges to prefer against an accused. The then Lord President went on to say,

*....when deciding whether or not to prosecute and if so on what charge, whether a lesser or a greater one, it must not be thought that he may act dishonestly. The public of whose interest he is the guardian has a right to expect him to act honestly, without fear of powerful national and local figures or of the consequences to him personally or politically, and without favouring his relatives and friends, and supporters, his principle concern being to maintain the rule of law so that there will be no anarchy and to maintain standards in public life and the private sector;*⁴¹

In instituting a charge for possession of firearms against a person, the Attorney General will have the safety and security of the nation in mind. With such responsibility comes a duty to make sure that the charge commensurate with the offence, even if the suspect happens to be a child. The fact that ESCAR expressly include children in its' operation indicates that the Regulation is made available for children, and the government's view that the safety of the country will not be compromised although the suspect happens to be a child. The Attorney General on the

³⁸ Section 376(1) Criminal Procedure Code (Act 593)

³⁹ *Johnson Tan Han Seng v PP* [1977] 1 MLJ 66.

⁴⁰ *Ibid* at p. 68.

⁴¹ *Ibid* at p. 68.

other hand would have this in mind in making his decision when instituting a charge against a child for possession of firearms.

The existence of ESCAR indicates the clear conflict of safeguarding the rights of the child and the governments' responsibility towards the nation. It is the writer's view that a holistic approach should be taken in safeguarding the rights of the public which include children who are the responsibility of the public.⁴² With the ratification of the CRC, a clear policy should be laid down by the government for children, child offender and their rehabilitation, to erase the tension and the conflict which exist in deciding between public safety, and safeguarding children. After all the country recognizes that;

*the country's vision of a fully developed nation is one where social justice and moral, ethical and spiritual developments are just as important as economic development in creating a civil Malaysian society which is united, progressive, peaceful, caring, just and humane.*⁴³

The country also recognizes that

*a child is not only a crucial component of such society but also the key to it's survival, development and prosperity.*⁴⁴

With such vision, it is the writer's view that the vision is in line with the judgment in *Smith* that,

*...in the case of young offender there can hardly be any conflict between the public interest and that of the offender. The public have no greater interest than that he should become a good citizen.*⁴⁵

With such policy, laws can be made or amended according to the said policy. Action will only to be taken according to the said policy without any conflict coming in between a child and the security of the country. And the Attorney General will have a clearer guide line in instituting a charge against a child offender. Regulation 3(3) ESCAR can be abolished. The position will be in line with the CRC and Act 611.

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⁴² Convention on the Rights of the Child.

⁴³ Preamble of Act 611.

⁴⁴ Preamble Act 611.

⁴⁵ [1964] Crim. L.R. 70

